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Chapter 8

The Darker Side of Rights in Global Intellectual History:

An Ambivalent Case of Franciscan Poverty

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Abstract

This chapter argues that the history of the Franciscan Order can provide an alternative perspective on the darker side of rights which goes beyond the critiques already established by postcolonial studies. It uses the methodologies of global intellectual history to question the boundaries of the contextual analysis of concepts. Postcolonial critiques of the darker side of rights have focused upon the entanglement between rights and colonialism that developed from the sixteenth-century extra-European conquests. By focusing on the disputes about the legal and theological permissibility of Franciscan poverty in the medieval period, we see that discourses of rights were already entangled with colonial processes prior to extra-European conquests. In trying to theorize an ideological position of poverty, Franciscans had an ambivalent role in this history as they contributed to the development of rights by criticizing increasingly legal understandings of rights and were critics of the way in which this restricted other ways that the poor could legitimately use to acquire the things of necessity.

Introduction

This chapter responds to the questions raised by this volume by reflecting on the geopolitical landscape of margins. Much of postcolonial studies formerly subscribed to a Wallersteinian

core-periphery structure, identifying marginality with subjugated extra-European colonies.¹ This geo-political imaginary has shaped global politics, especially that of “development”, whereby a wealthy West gives aid to an impoverished “developing world”, re-creating a world-system of centers and peripheries by re-inscribing neo-colonial relations of dependency.² However, this geo-political imagining that poverty and other forms of marginality have been created outside Europe obfuscate the ideological foundations of poverty as a European project that becomes a global project through colonialism. While “poverty” is not a universal category but a complex construct, the history of poverty helps reshape the landscapes of both global history and postcolonial critique as it transcends the boundaries of periodization and facilitates a reflection on the relationship between Europe and the world, challenging the chronologies and geographies of the history of colonialism and the geometries of power. The margins dealt with in this paper are therefore temporal and spatial, integrating Europe and the Middle Ages more fully into the history of colonialism; disciplinary, questioning the boundaries between intellectual and cultural history, and global and postcolonial history; existential, since extreme poverty and subsistence rights exist at the boundary between life and death; and intellectual, since discussions of the existential questions of poverty impact upon the conceptual landscapes of rights.

The aim of this chapter is to use the history of the Franciscan Order, a socio-political-religious movement with global dimensions, to go beyond the established paradigm of the darker side of rights. Through their experimentation with poverty, Franciscans made a unique contribution to the history of rights and colonialism. Franciscan history offers an interesting perspective, not only because they played an important role in the history of late medieval Europe as well as the early history of extra-European colonialism, but also because they

¹ This is at the foundation of Dipesh Chakrabarty’s call to “provincialize Europe”. Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: NJ: 2007).

² Immanuel Wallerstein, *The Modern World System*, vols. 1-3 (New York: 1979-1989).

voluntarily aligned themselves with the poor and gave a face to marginality, albeit a Janus face. Through their struggle to experience and understand poverty they experienced both subjugation and power in the Middle Ages and their history offers a double perspective. Franciscans were early critics of the darker side of rights and they provide a window into historic ambivalences within the history of rights.

Established Paradigm of the Darker Side of Rights

There is an established paradigm of the darker side of rights which stems from the perspectives of postcolonial studies. Scholars have recognized that rights projects have imperial dimensions as the universalization of a Western concept. Brian Tierney asked “is the whole idea of human rights peculiarly a product of Western culture?”³ In *Laws of the Postcolonial*, Peter Fitzpatrick and Eve Darian-Smith claim that it is now a “standard criticism” that “‘universal’ human rights enshrine occidental values”,⁴ and similar critiques occur in existing global histories and discussions of globalization.⁵ The history of the development of rights as a global project emerged in the context of extra-European colonialism and the genealogy of rights is entangled with this colonialism. The discourse of natural rights was developed in the sixteenth-century by the so-called School of Salamanca for the purposes of legitimating Spanish colonialism, and this is recognized as a precursor to the doctrine of “modern” human rights.⁶ The debates of 1550 between Spanish theologian Bartolomeo Las Casas (1484-1566) and Spanish humanist Juan Ginés de Sepúlveda (1489-1573) are often taken as the showcase battle that initiated the

³ Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Atlanta, GA: 1997), 2.

⁴ P. Fitzpatrick and E. Darian-Smith, “Laws of the Postcolonial: An Insistent Introduction,” in *Laws of the Postcolonial*, eds. E. Darian-Smith and P. Fitzpatrick (Michigan: 2002), 8. See also Anthony Pagden, “Human Rights, Natural Rights, and Europe’s Imperial Legacy,” *Political Theory* 31:2 (2003): 171-199.

⁵ For example, B.S. Turner and H. Haque Khondker, *Globalization East and West* (London: 2010), 163.

⁶ For example, A. García y García, “The Spanish School of the Sixteenth and Seventeenth Centuries: A Precursor of the Theory of Human Rights,” *Ratio Juris* 10:1 (1997): 25-35; and Pagden, “Human Rights, Natural Rights.”

long march to modern human rights. Lewis Hanke traced the contribution of Spanish theorists to the history of rights during the history of the Spanish Empire,⁷ and this was initially seen as a contribution to the myth of the Spanish Empire as a benevolent empire, the so-called White Legend.⁸ Others have seen the Spanish contribution to rights as another contribution to colonialism. For example, Daniel Castro described Las Casas, who famously produced a rights-based defense of the Amerindians, as a “tactician of ecclesiastic imperialism”.⁹ The contribution of another Salamanca rights scholar, Francisco de Vitoria (1492-1546) has also been critiqued. Carlos Esteban Deive contended that “in reality, Vitoria’s opinion of the Indians scarcely differed from that of Sepúlveda”.¹⁰ Anthony Anghie famously exposed the problematic relationship between Vitoria’s contribution to international law and colonialism.¹¹ Robert Williams argued that “Vitoria’s Law of Nations provided Western legal discourse with its first secularly oriented, systematized elaboration of the superior rights of civilized Europeans to invade and conquer normatively divergent peoples.”¹² These critiques identify the entanglement between rights, understood as a basic protection of an individual and the limitation of subjugation and colonialism, understood as the exploitation of individuals and the extension of subjugation. Existing critiques of the darker side of rights tend to focus on the development of extra-European colonialism in the sixteenth century, and particularly the role that rights played in the legal processes which constructed the space of the Americas as colonial space.¹³

⁷ Lewis Hanke, *All Mankind Is One: A Study of the Disputation Between Bartolomé De Las Casas and Juan Ginés De Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (DeKalb, Ill.: 1994).

⁸ B. Keen, “The White Legend Revisited: A Reply to Professor Hanke’s ‘Modest Proposal,’” *The Hispanic American Historical Review* 51:2 (1971): 336-335.

⁹ D. Castro, *Another Face of Empire: Bartolomé De Las Casas, Indigenous Rights, and Ecclesiastical Imperialism* (Durham, NC: 2007), 13.

¹⁰ “La opinión de Vitoria sobre los indios, en realidad, apenas difiere de la Sepúlveda,” Carlos Esteban Deive, *La Española y la esclavitud de los Indios* (Santo Domingo: 1995), 21.

¹¹ Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, UK: 2005).

¹² R.A. Williams, *The American Indian in Western Legal Thought: The Discourse of the Conquest* (Oxford: 1990), 106, cited in G. Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria* (Aldershot, UK: 2002), 99.

¹³ For example, S. Arias and R. Marrero-Fente (eds.), *Coloniality, Religion, and the Law in the Early Iberian World* (Nashville, TN: 2014), and Darian-Smith and Fitzpatrick, *Laws of the Postcolonial*.

The global turn prompts us to adopt a broader perspective of “context”, and the intellectual history of medieval Europe reminds us that, historically, law was not the only context in which rights could be understood and that “rights” have had different articulations and meanings. If we integrate the history of Europe and the Middle Ages, we arrive at an alternative perspective on the darker side of rights by seeing the way in which ambivalence, the simultaneous accommodation of contradictory positions, was part of the internal dynamics of the concept of right.

Franciscan history offers a way to approach this ambivalence. Their history is entangled both with the intellectual and political history of late medieval Europe and with the unfolding of extra-European colonialism in the Americas in the sixteenth century. The ambivalence of Franciscan history is generated by their complex ideology of poverty, which simultaneously revealed the sufferings of poverty while also valorizing poverty as a sacred category within the Christian tradition. Through their performance of voluntary poverty, they expressed solidarity with the poor of Europe and with the Amerindians in the sixteenth century, while also representing an elite group. They expressed solidarity with the poor, but they also celebrated poverty.

Franciscan History: A Strategy for Accessing Historical Ambivalence

The history of the Franciscan Order is a prism through which we can see the history of ambivalence. The Franciscans emerged in Italy in the early thirteenth century and voluntarily aligned themselves with the poor and marginalized within European society. Later, they played important roles in the history of European colonialism in the Americas in the sixteenth century. Franciscan history provides a way to transcend the boundaries of periodization and the geographies associated with the history of colonialism and reflect upon the histories of

marginality which are produced globally.

The Franciscans harnessed ambivalence. First, they were institutionally ambivalent; they had emerged as a radical counter-community but were absorbed into the hierarchy and bureaucracy of the Church. Their voluntary alignment with the poor and dispossessed had been controversial as it contained a radical criticism of society. The Order's founder, Francis of Assisi (1182-1226), renounced his possessions to live from what he could receive from begging, like the poor. Through practicing voluntary poverty he challenged the voluntary nature of the redistribution system of charity, claiming that "alms are a legacy and a justice due to the poor that our Lord Jesus Christ acquired for us".¹⁴ Through re-enacting the poverty of Christ and the Apostles, the Franciscans also posed a criticism to the wealth of the Church. However, despite occupying a radical position, they avoided charges of heresy and were assimilated into the Church.

Second, their doctrine of absolute and evangelical poverty involved an inversion of familiar landscapes of power; they saw themselves as liberated and empowered by poverty, subjugation, and obedience. This paradox was explored in particular by the more radical Spiritual Franciscans that emerged in the fourteenth century. For example, Franciscan friar Angelo of Clareno (1247-1337) wrote, "he frees himself from earthly desires from the bottom up who wants to be free from the body, and wants by means and punishments and torture to cross over to Christ, who bore the suffering and the death of the cross for us".¹⁵ Here we see the Franciscan idea that freedom is achieved through suffering. This pursuit and valorization of the complete overcoming of self, remained important to Franciscans in the sixteenth century as they spread across the Americas, the first missionaries amongst the Amerindians. The *Oroz Codex* (documents relating to the Franciscans in the Americas compiled in the late sixteenth

¹⁴ Francis of Assisi, "Fragments," in *Francis of Assisi: Early Documents*, vols. 1-2, eds. Regis J. Armstrong, Hellman J. A. Wayne and William J. Short (New York: 1999-2001), 90.

¹⁵ Angelo Clareno, *A Chronicle or History of the Seven Tribulations of the Order of Brothers Minor*, trans. David Burr and E. Randolph Daniel (New York: 2005), 20.

and early seventeenth centuries) reported how Martín de Valencia (1474-1534), the leader of the first Franciscans to arrive in Mexico after the conquest, had performed violence against himself in his Spanish hometown for the love of Jesus and “to conquer himself”.¹⁶ The Franciscans’ inversion of the familiar landscapes of power, their exploration of poverty as power and suffering as freedom, provide a way to view the ambivalence which is intrinsic to the darker side of rights.

Third, the Franciscans are known for their contribution to the history of rights, but rather than seeing rights as a protection of freedom, the Franciscans wanted freedom from legal rights. Franciscan intellectuals had tried to engineer a radical doctrine of poverty in the Middle Ages which theorized a space of action which was free from the constraints of all kinds of property rights. The conceptual possibility was designed by Minister General of the Order, Bonaventure (1217-1274), with the term *simplex usus* (simple use of goods), which was differentiated from all kinds of property rights (*dominium* understood as equivalent with *ius*). Pope Nicholas III (as pope 1277-1280) issued the interpretation of the Franciscan rule in his bull *Exiit qui seminat* (1279) and codified (within the Bonaventurian lines) the Franciscan claim to be free from property rights,¹⁷ using the category of *simplex usus facti* to make a distinction from *usus iuris*. The arrangement was controversial and stockpiled problems for the Franciscan order. After *Exiit*, the Franciscans were opposed by the secular masters of the University of Paris, who refuted the idea that the Franciscans could be extra-legal persons; using things without rights threatened the juridical framework of society. In his *Quodlibet XII*, Godfrey of Fontaines (c.1250-1309) claimed that it was impossible for the Franciscans to renounce their right to use

¹⁶ Oroz Codex, ed. and trans. A. Chavez (Washington, DC: 1972), 180.

¹⁷ Nicholas III, *Exiit qui seminat*, in *Liber Sextus, Corpus iuris canonici*, ed. E. Friedberg (Leipzig 1879; Graz 1959, 2nd ed.) col. 1109-1121; translation from the *Register of Nicholas III*, 232-241, available at: <http://www.ewtn.com/library/PAPALDOC/N3SEMIN.HTM> (14.04.2011). See also David Flood, “Introduction, Franciscan Poverty,” in *Nicolaus Minorita, Chronica: Documentation on Pope John XXII, Michael of Cesena and the Poverty of Christ with Summaries in English: A Source Book*, eds. Gedeon Gál and David Flood (New York: 1996), 34.

temporal goods in extreme necessity because everyone has a right to use goods for sustenance.¹⁸ Another secular master, Henry of Ghent (1217-1293), opposed the idea that the Franciscans could be free from property as they claimed, because everyone has a property right in their own person, which was both a right and a duty since one must obtain the basic necessities to sustain life, even by force if necessary.¹⁹ These thirteenth-century oppositions to the Franciscans' position are often overlooked by rights historians, but, as Brian Tierney noted, the discussions on dominion of self and the rights of necessity set the ground work for those of the sixteenth and seventeenth centuries.²⁰

Despite the opposition of the secular masters in the late thirteenth century, there were Franciscans who wanted to expand rather than to contract the Franciscans' ideology of poverty. Peter John Olivi (1248-1297) helped shape this more radical movement. He advocated not only use without ownership, but poor use (*usus pauper*), playing with the boundaries of what was necessary to sustain life.²¹ He was also sceptical about rights. Olivi interpreted rights pluralistically, not as an inherent good. As Jussi Varkemaa reminds us elsewhere, Olivi associated the notion of rights as a power, but also as a subjection or obligation (*ius subiunctionis vel obligationis*), as well as the right of debt (*ius debiti*).²² As Varkemaa also observes, Olivi was interested in metaphysics and his main question was whether objects signified by words had any real existence.²³ This questioned the relationship between "right" as concept and physical reality.

The fascination with rights as a power from which the Franciscans wanted to be free in

¹⁸ Godfrey of Fontaines, *Quodlibet* XII, q. 19, 142. Cited in Virpi Mäkinen, "Rights and Duties in Late Scholastic Discussion on Extreme Necessity," in *Transformations in Medieval and Early-Modern Rights Discourse*, eds. Virpi Mäkinen and Petter Korkman (Dordrecht: 2006), 47.

¹⁹ Tierney, *The Idea of Natural Rights*, 86. See also Henry of Ghent, *Quodlibetal Questions on Moral Problems*, trans. Roland J. Teske (Milwaukee, Wis.: 2005).

²⁰ Tierney, *The Idea of Natural Rights*, 89. See also Jussi Varkemaa, *Summenhart's Theory of Individual Rights* (Leiden: 2012).

²¹ Peter John Olivi, *De usus pauper: The Questio and the Tractatus*, ed. David Burr (Firenze: 1992).

²² Varkemaa, *Summenhart's Theory*, 21, citing "Question de P.J. Olivi "Quid ponat ius vel dominium ou encore De signis voluntariis," ed. P. F. Delorme, *Antonianum* 20 (1945): 309-330.

²³ *Ibidem*.

order to achieve their poverty was a later development of the Order's history. Regis J. Armstrong reminds us that St. Francis never referred to *dominium* or *ius*, the concepts that came to dominate the poverty dispute and its contribution to the history of rights.²⁴ During the fourteenth-century phase of the dispute, English Franciscan theologian William of Ockham (1285-1347) conceded that use in the case of extreme necessity was a natural right which was inalienable. The Franciscans' desire to escape from the power and legal framework of rights in fact paved the way for the development of the history of individual natural rights. In order to realize a theological ideal of poverty, the Franciscans tried to negotiate a space for existing without legal rights, but they simultaneously contributed to the language and conceptual apparatus of rights discourse. They were questioning the inherent "goodness", or even neutrality, of rights, and this offers insights into the longer history of the darker side of rights.

Franciscan history, especially their interpretation of poverty as a way of licitly using the things of necessity without rights, signposts three possible insights into the darker side of rights. First, the manipulation and suppression of the Franciscans' position regarding rights indicates that processes of marginalization and the colonization of concepts, languages, and memories were not only part of the history of extra-European colonization but also part of the history of Europe. Second, the Franciscans, whose ideas were also repressed in the Middle Ages, can be thought of as the first postcolonial critics of the darker side of rights. Third, ideas that were used during the discussion of Franciscan poverty, such as the idea that all things were common in the case of necessity, had ambivalent implications which reveal a darker side of rights.

Franciscan History Reveals the Colonial Processes within Europe

The Franciscans, who have been recognized for their contribution to colonialism as

²⁴ R.J. Armstrong, *St. Francis of Assisi: Writings for a Gospel Life* (Slough: 1994), 153.

missionaries in the Americas,²⁵ themselves had their ideas suppressed in Europe in the Middle Ages. They experienced processes of control that are normatively associated with operations of power in extra-European colonial contexts. The history of the suppression of elements of the Franciscan Order and parts of their philosophy of poverty shows that power processes, including the control of language, ideas, and memory, were experienced in Europe before they became elements of European overseas colonialism.²⁶ The critical phase of suppression came in the fourteenth century, after Pope John XXII (1316-1334) issued *Quorundam exigit* (1317). This condemned the teachings of the Spiritual Franciscans,²⁷ four of whom were condemned by the Inquisition and burnt. In 1322 John XXII issued *Quia nonnunquam* which suspended the prohibitions of Nicholas III against debating and commenting on *Exiit qui seminat* under certain circumstances. This opened the debate on the terms of *Exiit qui seminat*, the document that had enabled the Franciscans to claim that they were free from both property and rights.²⁸ Using the ideas of the Dominican scholar Hervaeus Natalis (1260-1323), John XXII developed his attack on Franciscan ideas in his *Ad conditorem canonum* (1322),²⁹ and *Cum inter nonnullos* (1323). By 1329 John had condemned the Minister General of the Franciscan Order, Michael of Cesena (c.1270-1342), his followers, and their theoretical defense of poverty.³⁰ This papal opposition

²⁵ See Julia McClure, *The Franciscan Invention of the New World* (Basingstoke: 2016). See also I. Clendinnen, *Ambivalent Conquests: Maya and Spaniard in Yucatan, 1517-1570* (Cambridge, ??: 2003); R.H. Jackson and E. Castillo, *Indians, Franciscans, and Spanish Colonization: The Impact of the Mission System on California Indians* (Albuquerque: 2001).

²⁶ See Julia McClure, *The Franciscan Invention*.

²⁷ John XXII, *Quorundam exigit*, in *Bullarium Franciscanum*, ed. J. Sbaralea and C. Eubel (Rome: 1898), vol. 5, no. 89, 128-131. The Spiritual Franciscans were a more radical Franciscan sect, adhering to an extreme interpretation of poverty and harboring apocalyptic ideas. See David Burr, *The Spiritual Franciscans: From Protest to Persecution in the Century after Saint Francis* (University Park: 2001).

²⁸ John XXII, *Quia nonnunquam*, in *Corpus iuris canonici*, ed. Aemilius Friedberg, Editio lipsiensis secunda (Leipzig: 1879), vol. 2, Ex.Ioh.XXII, col. 1224.

²⁹ John XXII, *Ad conditorem canonum*, col. 1225, ff. There were two versions of this bull, see Jonathan Robinson, *William of Ockham's Early Theory of Property Rights in Context* (Leiden: 2012), page(s) and Virpi Mäkinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Leuven: 2002), 148-49.

³⁰ John XXII, *Quia vir reprobis*, in *Bullarium Franciscanum*, ed. J. Sbaralea and C. Eubel (Rome: 1898), vol. 5. The whole text of *Quia vir reprobis* is included in William of Ockham's *Opus nonaginta dierum*, which has become the standard source for this bull. This argument was supported by q. 3, a. 1 of Natalis' *Liber de paupertate Christi et apostolorum*. See Hervaeus Natalis, *The Poverty of Christ and the Apostles*, trans. J.D. Jones (Toronto: 1999).

to the Franciscan position provides an insight into the power processes and manipulations of concepts developed in medieval Europe.

The opposition to the Franciscan position went further than revoking their legal arrangement, but also manipulated meaning and memory and transformed the landscape of conceptual possibility within Europe. When the Spanish conquistadores arrived in the Americas, they set fire to codices, aiming to destroy traces of history and ideas that could challenge the orthodox beliefs of the Catholic Church. The idea of controlling texts, language, and collective memory was not a colonial strategy invented overseas but had been a normal practice of the battle for orthodoxy within Europe. The suppression of radical Franciscan interpretations of poverty, which had radical implications for property rights and social order, was part of this.

For example, in his *Cum inter nonnullos*, John XXII ruled that it was heretical to claim that Christ and the Apostles had owned nothing.³¹ Not content at stopping at the history of Christ and the Apostles, John went on to transform the landscape of the history of property, starting with the paradise of the Garden of Eden. Melanie Brunner has argued that Pope John XXII's discussion of the origin of private property is evidence that the pope had "been forced onto the Franciscans' own ground", since, as Brunner reminds us, it was Bonagratia of Bergamo (1265-1340), procurator of the Order, who had first referred to the book of Genesis in his defense of the Franciscan poverty ideal.³² Since *Exiit qui seminat* had been enshrined in canon law in the 1290s, the Franciscan position that there was no dominion in the state of innocence had become dominant, but this issue had long been debated. In his several bulls, John XXII used linguistic analysis, and uncontroversial concepts from Roman law, to argue that Adam had

³¹ John XXII, *Cum inter nonnullos*, in *Corpus iuris canonici*, ed. Aemilius Friedberg, Editio lipsiensis secunda (Leipzig: 1879), vol. 2, Ex. Ioh. XXII, col. 1229–1230; translation available at <http://www.franciscan-archive.org/index2.html> (15.04.2011).

³² Melanie Brunner, "Pope John XXII and the Michaelists", *Church History & Religious Culture* 94:2 (2014): 209.

dominion in the state of innocence; he used language to manipulate the collective religious memory and his teachings on the state of innocence and first acquisition differed greatly from the traditional theological doctrine of the origin of property common to the collective memory of Christianity. It was significant for the Americas that the state of innocence had been reimagined during the Franciscan poverty dispute as the place where property developed, since the New World was paradise, and thus associated with the state of innocence, which was now a place where property could develop through First Acquisition.³³ Following John XXII's ruling, there should be no qualms about establishing a private property regime, since by predating private property to before the Fall implied that private property was of divine origin.³⁴ Gordon Leff described John XXII's ruling that there was property in the state of innocence as the "sanctification of property rights".³⁵

The papacy did not only target memory but also linguistic meaning; according to William of Ockham, John XXII argued that the Franciscans "by means of the ambiguity of terms and names (...) labours to bring in errors, overthrow the truth, drag the sacred Scriptures into a false meaning".³⁶ The repression of the radical implications of the Franciscans' poverty doctrine was a struggle not only to assert monopolies of law, but also of memory and meaning. Postcolonial scholars have recognized the role of the manipulation of memory and language in the history of colonialism, yet in the Franciscan poverty dispute we find evidence that such processes are part of the longer history of rights.

The contribution of the Franciscans to the history of rights is often formulated in a

³³ For example, see Christopher Columbus, "Narrative of the Third Voyage of Christopher Columbus to the Indies, in which He Discovered the Mainland, Dispatched to the Sovereigns from the Island of Hispaniola," in *The Four Voyages of Christopher Columbus, being his own log book, letters and dispatches with connecting narratives drawn from the Life of the Admiral by his son Hernando Colon and other contemporary historians*, ed. and trans. J.M. Cohen (London: 1969), 218.

³⁴ For more on this discussion, see Brunner, "Pope John XXII and the Michaelists," 210.

³⁵ Gordon Leff, "The Bible and Rights in the Franciscan Disputes over Poverty," in *The Bible in the Medieval World: Essays in Memory of Beryl Smalley*, eds. Katherine Walsh and Diana Wood (Oxford: 1985), 231.

³⁶ William of Ockham, *A Translation of William of Ockham's Work of Ninety Days*, 2 vols., trans. John Kilcullen and John Scott (Lewiston, NY: 2000), 148.

constructive way, the way in which Ockham contributed to the transition from objective to subjective understandings of rights, for example, and yet it is the suppression of alternative ideas engineered by the Franciscans that was most significant. The Franciscans had played a role in this themselves since the Michaelists had tried to suppress the more radical ideas of the Spiritualists.³⁷ The Franciscans had wanted to be free from property and rights, and the denial of this possibility by Pope John XXII in the fourteenth century is at the heart of the Franciscan poverty dispute and the Franciscans contribution to the history of rights. As Brian Tierney's work also shows, rather than the Franciscans achieving the possibility of being free from property rights, the discourse contributed to the way in which, instead, property is the "paradigmatic right" of modernity.³⁸ The expansion of the territory of property rights partly comes through the successful suppression of the alternative freedom from property rights proposed by the Franciscans.

As the Amerindians would find out in the sixteenth century, property rights might not eradicate poverty, but would instead create a veneer of legitimacy for the appropriations which created it. Paul III's bull, *Sublimis Deus* (1537) claimed that "they [the Indians] should enjoy their liberty and the possession of their property".³⁹ This followed on from the Laws of Burgos, an important document in the history of the colonization of the New World, which justified the forced migration and labor of the Amerindians while also guaranteeing that "as soon as the Indians are brought to the estates they shall be given all the aforesaid as their own property".⁴⁰ Like the Franciscans, the Amerindians could not be free from property, but they could not be saved by it either. Just as the Franciscans had argued in the fourteenth century, now two

³⁷ The Michaelists is the name given to the followers of Michael of Cesena, Minister General of the Order between the years 1316–1327, especially those that fled with him from Avignon in 1327. These were Bonagratia of Bergamo, Heinrich of Thalheim, Francesco d'Ascoli, and William of Ockham.

³⁸ Tierney, *The Idea of Natural Rights*, 131.

³⁹ Pope Paul III, *Sublimis Deus*, 1537, reproduced in Lewis Hanke, *All Mankind Is One: A Study of the Disputation Between Bartolomé De Las Casas and Juan Ginés De Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (DeKalb, Ill.: 1994), 21.

⁴⁰ *Laws of Burgos of 1513–1513, Royal Ordinance for the Good Government and Treatment of the Indians*, trans. and intr. Lesley Byrd Simpson (San Francisco: 1960), 15.

centuries later property was not a source of liberty for the Amerindians but a form of incarceration in a prison of disadvantaging legal structures.

The Franciscans: The First Postcolonial Critics of the Darker Side of Rights

The Franciscans experienced the repression of their ideas in the late Middle Ages; they can also be thought of as the first postcolonial critics of the darker side of rights. As is clear from Ockham's writings, they also saw rights as a servitude or oppressive power from which they wanted to be free.⁴¹

The Franciscan contribution to the history of rights has been noted, and yet it is worth considering the uncomfortable irony that their contribution is essentially the result of the suppression of their attempt to be free from concepts which they saw as oppressive. As stated at the beginning, scholars who have explored the entanglement between rights and colonialism have usually focused on the expansion of European legal processes. Yet, in the Middle Ages, law had not been the only context of right. In fact, during the Franciscan poverty dispute Ockham had opposed John XXII's over-use of legalistic reasoning with regard to right. Ockham defined the "right of heaven" (*ius fori*) as the "way persons living without positive legal institutions can licitly use material things for their preservation or comfort".⁴² He was a vehement critic of the monopoly of the legal context and criticized the way in which John XXII, a trained canon lawyer, took a legalistic rather than a theological approach to the question of friars' poverty.⁴³ Ockham had argued that the Franciscans were free from all positive (law) rights and that they simply used things since the permission of the owner enabled licit use

⁴¹ For an example, see Ockham, *Work of Ninety Days*, 358.

⁴² Arthur S. McGrade, and John Kilcullen, "Introduction," in *A Letter to the Friars Minor and Other Writings*, eds. Arthur S. McGrade and John Kilcullen (Cambridge: 1995), 16.

⁴³ See *Quillelmi de Ockham, Opus nonaginta dierum*, in *Opera Politica*, eds. R.F. Bennett and J.G. Sikes (Manchester: 1940), vol. 1, 287–374; in *Opera Politica*, eds. J. Sikes and H.S. Offler (Manchester 1963), vol. 2, 375–858.

without any rights.⁴⁴ He maintained that there was a difference between things that were just and things that were licit. The Franciscans claimed to exist outside the law. Ockham wanted Franciscan poverty to incorporate a poverty of law, arguing that the Franciscans did not have rights because they did not have the power to litigate in court.⁴⁵

John XXII opposed this space outside of law and ruled that the Franciscans had to be owners of the things that they consumed through use, and that they had to have a right for this to be licit.⁴⁶ John's legislation opposed the notion that there could be a realm of simple use or action between the just and the unjust.⁴⁷ Hervaeus Natalis's (1260-1323) *Liber de paupertate Christi et apostolorum* influenced John XXII's process of the juridification of the concept of right, which occurs through subtle linguistic manipulation, such as the conflation of the just and unjust with the licit and illicit.⁴⁸ Ockham had fought to defend the possibility of a "pure exterior act, neither just nor unjust", which could be attributed to irrationals such as animals, the mad, and children, and he claimed that this legitimate realm of action was accessible to Franciscans and in principle, to everyone.⁴⁹ The friar was supposed to be considered dead to the world, and so without property. The denial of the Franciscan position meant that it was impossible to be outside the system of law. Through the discourse of the Franciscan poverty dispute the context of law became hegemonic, despite Ockham's criticism of the growing monopoly of law on the concept of right. Postcolonial scholars have critiqued the colonial function of law, yet we find a similar critique in the work of Ockham in the early fourteenth century.

As Homi Bhabha has argued, ambivalence is an important dimension of the postcolonial perspective,⁵⁰ and ambivalence was certainly part of the Franciscans' doctrine of poverty and

⁴⁴ Ockham, *Work of Ninety Days*, 433.

⁴⁵ Ockham, *Work of Ninety Days*, 142-44, 146.

⁴⁶ John XXII, *Ad conditorem canonum*, in *Corpus iuris canonici*, ed. E. Friedberg, Editio lipsiensis secunda (Leipzig: 1879), vol. 2, Ex. Ioh. XXII, col. 1225.

⁴⁷ This was Ockham's argument, see *Work of Ninety Days*, 450.

⁴⁸ Hervaeus Natalis, *The Poverty of Christ and the Apostles*, 43.

⁴⁹ Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge, UK.: 1997), 59, who cited Ockham's *Opus nonaginta dierum*, c. 58, 551.

⁵⁰ Homi K. Bhabha *The Location of Culture* (London & New York: Routledge, 1994) pp. 85-92,

perspective on rights. In the fourteenth century, the main objective of Franciscan intellectuals was not to defend the rights of the dispossessed but to show that they, like the marginal groups of society, also had no rights. For example, Bonaventure and Ockham both compared the Franciscan position to that of slaves to explain how it was that they had use without ownership.⁵¹ The use of slavery as an explanatory device for the Franciscan condition harks back to the original Franciscan view that emancipation could be found in hardship and subjugation. The Franciscans transmitted their ambivalence to the Americas in the sixteenth century and projected their perspective onto the Amerindians, sympathizing with the suffering of the Amerindians while suggesting that the Amerindians shared the Franciscans' valorization of the suffering of poverty. The sixteenth-century Franciscan chronicler and missionary Diego de Landa (1524-1579) projected the Franciscan sense of the freedom created through subservience onto the Amerindians; he wrote that the Indians became attached to the Franciscans, giving them information and taking their advice, because the Franciscans labored without self-interest, and their work resulted in greater freedom.⁵² De Landa projected this valorization of liberty in subjugation and labor at a time when the colonial labor demands on the Amerindians were increasing under *encomienda* and later *repartimiento*.⁵³ The language of the sixteenth-century Franciscan chronicles of the New World give an indication of one of the ambivalent colonial legacy of the Franciscans.

The Ambivalence of the Right of Necessity

First published Homi Bhabha, "Of Mimicry and Man: The Ambivalence of Colonial Discourse," *Discipleship: A Special Issue on Psychoanalysis* 28 (1984): 125–133.

⁵¹ Michael of Cesena made this case to refute the errors of *Ad conditorem cononum*; summarized by David Flood, "The Long Appeal," 214-15.

⁵² Diego de Landa, *Relacion de Las Cosas de Yucatan*, ed. M. Rivera (Madrid: 1985), 69.

⁵³ *Encomienda* was a system for forcibly (and legally according to the Spanish) extracting tribute and labor from the Amerindians. The *Encomienda* system began in the Americas in 1503 and was formally established by the Laws of Burgos in 1512.

The Franciscans not only played with the boundaries of freedom and power but also the existential boundaries governing human beings in the world. Their pursuit of radical poverty led them to their discussion of the rights of necessity.⁵⁴ The rights of necessity, which became essential to the Franciscan position, had ambivalent implications and uses. As they tried to explain how poverty freed them from property and rights, they argued that use could be separated from ownership, and that all things were common in the case of necessity. During the fourteenth-century poverty dispute, the claim that the Franciscans had neither property nor rights was reiterated by the Minister General of the Order, Michael of Cesena (1270-1342), who (similar to Bonaventure) delineated a “fourfold community of goods”: from divine right, from civil right, from ecclesiastical right, where goods are held collegially, and *from the necessity of nature*.⁵⁵ Ockham contributed to the defense of the Franciscan position and the idea that all things were common in the case of necessity, arguing that “necessity has no law”.⁵⁶ The lawlessness of necessity was double edged; it could be used, as it was by the Dominican thinker Domingo de Soto in the sixteenth century, to defend the rights of the poor to the necessities of life,⁵⁷ or it could be used to justify colonial appropriation.

In one sixteenth-century travelogue of a Franciscan missionary, we find an example of how the Franciscans could use the arguments about use without ownership in the case of necessity to justify their colonial acts in the New World. The Franciscan theologian Juan Focher used the Order’s poverty doctrine to justify the colonial appropriation of indigenous property in the Americas. Focher explained: “in the case of extreme necessity, it is said, when the things of necessity can be acquired in no other way, all things are common (...) in this case there is

⁵⁴ As Virpi Mäkinen has shown, the discussion of the right of necessity was not confined to the discourse of Franciscan poverty. See Mäkinen, “Rights and Duties,” 37-62.

⁵⁵ Flood, “The Long Appeal,” 220.

⁵⁶ Ockham, *Work of Ninety Days*, 89. Matt. 12:3-5.

⁵⁷ Domingo de Soto argued that the poor had a right to alms not only in the case of extreme necessity. See his *Deliberación en la Causa de los Pobres*, Salamanca, 30, de enero de 1545, in *El Gran Debate Sobre Los Pobres en el Siglo XVI*, ed. Félix Santolaria Sierra (Barcelona: 2003), 64.

no sin in taking from the goods of the pagans the things that are necessary for life”.⁵⁸ He added that “those who sustain the friars must also provide for those who, by mandate of the prince, accompany or protect the evangelic messengers”.⁵⁹ Focher used the idea developed by the Franciscans during the poverty disputes, that in the case of necessity all things were common, to justify the appropriation of indigenous goods by the Franciscans and their conquistador companions. The idea that all things were common in the case of necessity had other implications, especially during the development of European colonies overseas in the sixteenth century.

The importance of ambivalence to the darker side of rights is indicated by the “right to hospitality”,⁶⁰ which was developed by Francisco de Vitoria in the sixteenth century to justify the dimensions of Spanish overseas colonialism. Georg Cavallar summarizes that Vitoria’s right of hospitality encompassed the right to travel (*ius peregrinandi*), the right to dwell in the countries or territories visited, the right to trade, the freedom to use common property, the *ius solis*, or freedom of residence, nationalization and citizenship, and the negation of a right of expulsion without just cause.⁶¹ These rights could be used to justify European colonial actions in the Americas, such as the appropriation of raw materials like gold, pearls, and fish.⁶² It is interesting that while such rights (to travel, to reside in foreign places, to common property) were being used to justify European colonialism overseas at the expense of the Amerindians, such rights were also being denied to the poor of Europe through the sixteenth-century proliferation of poor laws, which repressed and discriminated against the poor.⁶³ For example, using ideas developed by the Ypres scheme, *Forma subventionis pauperum* (1531) and Juan

⁵⁸ Juan Focher, *Itinerario del misionero en América colección de libros y documentos referentes a la Historia de América*, vol. 22 (Madrid: 1960), 87.

⁵⁹ Focher, *Itinerario del misionero*, 89.

⁶⁰ See Francisco de Vitoria, *On the American Indies*, q. 3, a. 1, in *Francisco de Vitoria: Political Writings*, eds. Anthony Pagden and J. Lawrence (Cambridge: 1991), 278-284.

⁶¹ Cavallar, *The Rights of Strangers*, 108.

⁶² Vitoria, *On the American Indians*, 280.

⁶³ See F.R. Salter, *Some Early Tracts on Poor Relief* (London: 1936). See also Annabel S. Brett, *Changes of States: Nature and the Limits of the City in Early Modern Natural Law* (Princeton and Oxford: 2011).

Luis Vives (1493-1540), Charles V (as Holy Roman Empire 1519-1556 and the King of Spain 1516-1556) issued a decree forbidding begging throughout the empire. The Spanish poor laws restricted the rights to begging, movement between cities, the rights of foreigners, and access to the things of necessity. Anyone found begging without a license was considered a vagabond and subject to four years galley service on the first offense, eight years on second, life on third.⁶⁴ Thus, the ships that took the conquistadores to America to extend their “right to hospitality”, were powered by the poor of Europe, who had had their rights to hospitality suppressed. This final example is a reminder not only of more examples of the darker side of rights, but of the ambivalences surging below the familiar landscapes of global history, which are revealed by the history of poverty. Yet, the experiences of the darker side of rights have not been equally disbursed globally.

The Spanish Empire that unfolded in the sixteenth century was a deeply litigious world, and disputes about the rights of the poor played a role in the Spanish imperial project. These disputes are recorded in the *pleitos de pobres*, court cases involving poverty pleas. These *pleitos* do not represent dispossessed Amerindians, but rather European settlers who sought to avoid various license fees by appealing to the *Casa de Contratación*. The *Casa de Contratación* even met the costs of the *pleitos de pobres*.⁶⁵ Among these *pleitos* are claims for remittances from the license fees required to have black slaves in the Americas, because these owners of black slaves were apparently too poor to pay.⁶⁶ This reminds us that poverty could be used to claim rights, but whose rights were they protecting, and against whose freedoms and resources?

The discourse of rights developed in relation to the condition of those at the margins, the poor and those dispossessed by colonialism, and yet this discourse has not always offered

⁶⁴ Linda Martz, *Poverty and Welfare in Habsburg Spain: The Example of Toledo* (Cambridge, Eng.: 1983), 30.

⁶⁵ For example, *Archivo General de Indias* (AGI), INDIFERENTE, 1966, L.15, F.405V406, INDIFERENTE, 426, l25, f345r-345v, INDIFERENTE, 450, l a6, f. 220v -221.

⁶⁶ AGI, INDIFERENTE, 424, L.22,F,519V, SANTO_DOMINGO,868,l.1.f.23R-24R, SANTO_DOMINGO, 1121,L.2,F.186.

protection against exploitation. Rather, as the Franciscans predicted and indeed (perhaps unintentionally) contributed to, rights, such as the rights of the poor to the basics of necessity through charity, may have resulted in an entrapment in a legalistic and ideological entanglement which regularized the structure of power asymmetries. For example, contemporary commentators have observed how international development has failed to eradicate poverty, since it is based on a paternalist idea about charity which developed in the history of the West which is structurally, and one might add ideologically, incapable of overcoming inequality.⁶⁷ In his work reassessing international humanitarianism, David Kennedy also observed that rights may be part of the problem inhibiting the development of global equality, but points to broader contextual issues in the deployment of rights,⁶⁸ rather than the question raised by the intellectuals of the Franciscan Order about the nature of rights themselves.

New research on inequality and the new politics of distribution currently being developed by the basic income movement is beginning to call the role of rights into question. For example, James Ferguson cites the case of a poor South African who is being “educated” about his right to a house: the South African responds by saying, “but I don’t want the right to a house”, then pauses and adds, “I want a house.”⁶⁹ This raises the issue of the relationship between the discourse of rights and the politics of practices redistribution in a world of systemic inequality. This small final example reminds us that for those suffering from the lack of something such as a house, the right to something is not the thing itself.⁷⁰ In this way, a right to something might not overcome its absence, but rather serve as a strategy for avoiding real distributional justice. Such skepticism over the relationship between words such as “rights” and objects needed such as houses were, perhaps, anticipated by Olivi’s metaphysical interrogation of the relationship between words and things, and the Franciscans’ attempt to establish a system

⁶⁷ See also chapter 10 in this volume.

⁶⁸ David Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: 2004).

⁶⁹ James Ferguson, *Give a Man a Fish* (Durham, NC: 2015).

⁷⁰ Ferguson, *Give a Man a Fish*.

of use unbound by the juridical framework of property rights.

Conclusion

In conclusion, the history of the Franciscan Order can provide an alternative perspective on the darker side of rights which goes beyond the critiques already established by postcolonial studies. It shows the need to transcend the period boundaries of modern and pre-modern, and to read the histories of Europe and the Extra-European colonialism together, to transcend postcolonial geographies. Understanding that the concept of right itself is the product of the suppression, the suppression of the alternative ideas developed by the Franciscans, goes some way to open further avenues of inquiry into historic ambivalences in the history of right and its entanglement with colonialism. It also demonstrates a different way to read the history of colonialism, showing that power processes were engineered within Europe before they were extended elsewhere. The experience of peripheralism or marginality is not confined to a space outside of Europe, but was instead an intrinsic part of European experience before it was exported elsewhere.

The history of rights has been developed at the margins, either with regard to the rights of the colonized subjects of the New World, or the poor of Europe; what is clear from both these cases is that concepts of rights have not always been developed to help those at the margins, but rather to legitimate control of them or their resources. This historic ambivalence, revealed by the history of the Franciscan Order, is the real darker side of the history of rights.

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